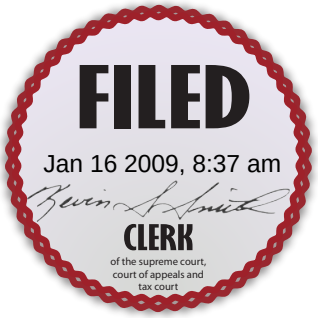


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# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| JOEL STOFFEL, | ) | |
| | ) | |
| Appellant-Plaintiff | ) | |
| | ) | |
| vs. | ) | No. 27A02-0806-CV-525 |
| | ) | |
| UNITED FARM FAMILY | ) | |
| MUTUAL INSURANCE CO., | ) | |
| | ) | |
| Appellee-Defendant. | ) | |

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable, Natalie Conn, Judge
Cause No. 27D03-0608-PL-222

**January 16, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Joel Stoffel appeals the trial court's grant of summary judgment in favor of United Farm Family Mutual Insurance Company ("United Farm"). We reverse.

## Issue

The restated issue is whether the trial court properly concluded that Stoffel is not entitled as a matter of law to coverage under an automobile insurance policy United Farm issued.

## Facts

The evidence most favorable to Stoffel as summary judgment non-movant is that in February 2002, Stoffel purchased an auto insurance policy from United Farm for his 1998 Buick. The Buick was the only vehicle listed on the policy. At that time, Stoffel also was an employee of United Farm, and he was a licensed insurance agent who received training regarding automobile policies.

On January 26, 2004, after leaving United Farm's employ, Stoffel sold the Buick to Zack Rahschulte through a conditional sales contract, under which Stoffel retained title to the car. Stoffel contacted Susan Haisley, a United Farm customer service representative and licensed insurance agent, and told her that he wanted to add Rahschulte to the policy because he was selling the car to Rahschulte on contract. Haisley told Stoffel that he did not need to add Rahschulte to the policy because he would be covered as a permissive driver of the Buick. Stoffel continued paying premiums on the policy after this time and United Farm continued accepting them.

In June 2005, Stoffel repossessed the Buick from Rahschulte, then filed a claim with United Farm for property damage to the vehicle that had been sustained while it was in Rahschulte's possession. United Farm denied coverage based on the following policy language: "Unless otherwise stated, the vehicle described on this declaration is not subject to any lease, rental, conditional sale, or purchase agreement, and the named insured is the sole owner thereof." App. p. 69. Elsewhere, the policy stated that it did not provide coverage for property damage to any vehicle "subject to any lease, rental, conditional sale or purchase agreement not specifically described in the declarations." Id. at 82.

On August 15, 2006, Stoffel filed suit against United Farm, seeking recovery under the policy. United Farm subsequently filed a motion for summary judgment. Stoffel responded and filed a cross-motion for summary judgment. On May 16, 2008, the trial court granted United Farm's motion for summary judgment and denied Stoffel's cross-motion. Stoffel now appeals the granting of United Farm's motion.

**Analysis**

We review a grant of summary judgment to determine whether there are genuine issues of material fact, and whether the moving party is entitled to judgment as a matter of law. Yates v. Johnson County Bd. of Comm'rs, 888 N.E.2d 842, 846 (Ind. Ct. App. 2008). We must construe all evidence in favor of the party opposing summary judgment, and all doubts as to the existence of a material issue must be resolved against the moving party. Id. at 847. We carefully review a grant of summary judgment in order to ensure

that a party was not improperly denied his or her day in court. Reeder v. Harper, 788 N.E.2d 1236, 1240 (Ind. 2003).

We first address Stoffel's argument that the policy language at issue here was ambiguous and did not entitle United Farm to deny coverage for his claim. Rather, Stoffel asserts that his selling of the Buick on contract only allowed United Farm to adjust the policy premium, not deny coverage. He directs us to the following language in the policy: "If there is a change to the information used to develop the policy premium or a change in any item of information on the declarations, you agree that we may adjust your premium and bill any additional amounts due during the policy term." App. p. 30.

Insurance policies are interpreted from the perspective of an ordinary policyholder of average intelligence, and if reasonably intelligent persons may honestly differ as to the meaning of the policy language, the policy is ambiguous. Allgood v. Meridian Sec. Ins. Co., 836 N.E.2d 243, 246-47 (Ind. 2005). Any ambiguities in a policy are construed strictly against the insurer to further the general purpose of the insurance contract to provide coverage. Id. at 247. Clear and unambiguous language in insurance policies should be given its plain and ordinary meaning. Cinergy Corp. v. Associated Elec. & Gas Ins. Servs., Ltd., 865 N.E.2d 571, 574 (Ind. 2007). Generally, the interpretation of an insurance policy presents a question of law. Id.

United Farm contends Stoffel has waived his argument based on this specific policy language because he did not make it before the trial court. Even if we were to deem this argument waived, we believe the language at issue is unambiguous. The

language Stoffel cites on appeal merely represents United Farm's reserving the right to charge a higher premium if there are changes made to the declarations. It clearly and unambiguously does not limit United Farm to only charging a higher premium if a change is made. If a change is made that triggers an exclusion or policy defense elsewhere in the policy, United Farm is not precluded from relying on it. Here, the policy clearly states that there is no coverage for a vehicle that is subject to a conditional sale contract not listed in the declarations. The contract between Stoffel and Rahschulte to sell the Buick was not listed in the declarations. The plain language of the policy would have permitted United Farm to deny coverage for this claim.

However, we conclude there is a question of fact, precluding summary judgment, as to whether United Farm waived reliance on this exclusion or is estopped from relying on it. Although Stoffel refers to "estoppel" instead of "waiver" throughout his brief, "'the terms are often used synonymously with respect to insurance matters.'" American Standard Ins. Co. of Wisconsin v. Rogers, 788 N.E.2d 873, 877 (Ind. Ct. App. 2003) (quoting United Servs. Auto. Ass'n v. Caplin, 656 N.E.2d 1159, 1162-63 (Ind. Ct. App. 1995), trans. denied). Whether there is waiver of an insurance policy provision generally is a question of fact. Id. Summary judgment is proper, however, if there are no disputed facts and the undisputed facts establish a party is entitled to judgment as a matter of law. Id. A party claiming waiver bears the burden of proving it. Id.

"The existence of waiver may be implied from the acts, omissions, or conduct of one of the parties to the contract." Id. Conduct of an insurer that is inconsistent with an

intention to rely on the requirements of the policy leading the insured to believe that those requirements will not be insisted upon is sufficient to constitute waiver. Id. Waiver and estoppel may apply to practically any ground upon which an insurer may deny liability. Gallant Ins. Co. v. Wilkerson, 720 N.E.2d 1223, 1227 (Ind. Ct. App. 1999).

Here, the facts most favorable to Stoffel are that after he entered into the conditional sales contract for the Buick with Rahschulte, he informed United Farm that he had done so by contacting one of its licensed agents, Haisley. Generally, the law imputes an agent's knowledge, acquired while the agent was acting within the scope of his or her agency, to the principal, even if the principal does not actually know what the agent knows. Federal Kemper Ins. Co. v. Brown, 674 N.E.2d 1030, 1033 (Ind. Ct. App. 1997), trans. denied. There is no contention by United Farm that Haisley was not its agent.

After being told that the Buick was being sold on contract, Haisley informed Stoffel that no changes to the policy were necessary because Rahschulte would be considered a permissive user of the Buick.[1] In reliance on this representation, Stoffel continued paying premiums on the United Farm policy rather than seeking a different policy. United Farm continued accepting and cashing those premium checks.

[1] Haisely claims not to recall making such a statement to Stoffel, or that she would have told Stoffel to direct his question to a different agent. Whether to believe Haisely or Stoffel on this point clearly is a question of fact that cannot be resolved on summary judgment.

We conclude this evidence creates a genuine issue of material fact as to whether United Farm waived its right to rely on the conditional sales contract as a basis to deny coverage for Stoffel's claim. Stoffel informed United Farm of the contract, and was told no changes to the policy were needed and that there would continue to be coverage for the Buick. United Farm makes much of the fact that Stoffel himself was a licensed insurance agent and one-time United Farm employee who should have understood that the policy precluded coverage for a vehicle subject to a conditional sales contract not disclosed on the declarations, regardless of what Haisley told him. The actual language of the policy is not at issue here, however; Haisely's alleged representations to Stoffel could reasonably have led Stoffel to believe that United Farm would not enforce the policy exclusion regarding conditional sales contracts. We do not believe Stoffel was required to contact multiple United Farm agents after speaking to Haisley, until he received a response different from hers. A principal is bound by acts of its agent that are within the usual and ordinary scope of business in which the agent is employed. Yeager v. McManama, 874 N.E.2d 629, 638 (Ind. Ct. App. 2007).

Coupled with Haisley's statements to Stoffel is the fact that United Farm continued to collect and never refunded premium payments Stoffel made while the vehicle was in Rahschulte's possession under the sales contract of which United Farm was aware. United Farm contends that it was not precluded from relying on a policy exclusion, simply because it collected premiums. This case, however, is unlike a situation in which an insurance company may properly collect premiums on an auto

insurance policy, but then deny coverage for a particular claim or accident based on a policy defense or exclusion related to that specific claim. Instead, here it is United Farm's apparent position that it would have denied any claim of any kind made by Stoffel with respect to the Buick during the time it was the subject of the conditional sale to Rahschulte. This is inconsistent with United Farm continuing to collect premiums for the policy, with the Buick being the only vehicle on that policy, after United Farm's agent had actual knowledge of the conditional sale.

As this court observed some time ago,

> where an insurance company by its course of dealings with the insured and others known to the insured has induced a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief.

West v. National Cas. Co., 61 Ind. App. 479, 490, 112 N.E. 115, 119 (1916). Stoffel designated sufficient evidence that United Farm by its representations and course of conduct may have waived its right to rely on the policy exclusion at issue.[2]

**Conclusion**

[2] Because we have determined that summary judgment was improperly granted, we need not address Stoffel's argument that an affidavit submitted by United Farm was improperly designated as evidence. We also do not address Stoffel's argument that summary judgment should have been entered in his favor on his negligence claim against United Farm. The denial of summary judgment is not a final judgment, but an interlocutory order. Cardiology Assocs. of Northwest Indiana, P.C. v. Collins, 804 N.E.2d 151, 154-55 (Ind. Ct. App. 2004).

There is a genuine issue of material fact as to whether United Farm waived its right to enforce the conditional sale policy exclusion. We reverse the granting of summary judgment to United Farm.

Reversed.

BAILEY, J., and MATHIAS, J., concur.